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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, impose an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The order of the court of appeals (J.S. App. 1a-2a)[1] is not reported. The district court's oral opinion (J.S. App. 15a-22a) and order (J.S. App. 13a-14a) of June 9, 1980, and its oral opinion (J.S. App. 23a-30a) of June 20, 1980, denying a motion for reconsideration, are not reported. The district court's orders of October 15, 1980 (J.S. App. 3a-6a), and October 16, 1980 (J.S. App. 7a), are not reported.

JURISDICTION

The district court's order appealed in No. 80-415 was entered on June 9, 1980. The notice of appeal was filed on June 11, 1980 (80-415 J.S. App. 23a), and the appeal was docketed on September 15, 1980. The judgment of the court of appeals appealed in No. 80-1239 (J.S. App. 31a-32a) was entered on December 16, 1980. The notice of appeal (J.S. App. 33a) was filed on December 19,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1239.

1980, and the appeal was docketed on January 21, 1981. The jurisdiction of this Court is invoked in both cases under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

2. Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 401 and 403, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1959, are set out at pages 35a-41a of the Appendix to the Jurisdictional Statement in No. 80-1239.

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") petitioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979. See J.A. 378a-379a.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad (J.A. 239a). On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed (J.A. 269a-271a).

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 35a-41a), required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrangement. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Sections 106(b) and (c) could not be stayed and that these orders could be reviewed only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106(e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act, 94 Stat. 403, required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except

in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were each limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. See J.A. 147a-148a. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 15a-22a). Although the court suggested that the statute might have other constitutional problems, it based its ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (*id.* at 17a-19a).[2]

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[2] In addition to challenging the labor protection provisions, the complaint also included challenges to a number of other provisions of the Rock Island Act. The decisions below, however, concern only the labor protection provisions of the Act. Until recently the Trustee and other plaintiffs have not pursued any aspects of the complaint other than the counts relating to labor protection. On July 10, 1981, the plaintiffs filed an amended complaint, the amended portions of which pertain to various Commission orders under Section 122 of the Act, 94 Stat. 409, which empowers the Commission to authorize other carriers to operate temporarily over the tracks and facilities of the Rock Island. By order of July 13, 1981, the court permitted the amended complaint to be filed.

The court noted that the Seventh Circuit would shortly be called upon to decide the constitutional question (*id.* at 18a), but nonetheless concluded that if the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 19a-20a). The court explicitly rejected the Commission's contention that no injunction should be entered until the Commission was given an opportunity to formulate a specific labor protection plan, stating (*id.* at 18a-19a):

> The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Accordingly, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (J.S. App. 13a-14a).[3]

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[4] Therefore, RLEA, the United States, and the

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[3] On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (J.S. App. 26a-27a).

[4] The judicial review provisions of Section 106(d) covered appeals of orders entered under Sections 106(b) and (c), which did not come into play until a labor protection plan was devised.

Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252. RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Justice Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Justice Stevens denied the application (J.S. App. 43a-47a; 448 U.S. 1301). Acknowledging that "[n]ecessarily, my views are tentative," Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property (J.S. App. 47a). Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (J.S. App. 47a). The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote. 448 U.S. 909. Thereafter, RLEA docketed its appeal as No. 80-415.

3. In response to the district court's injunction, Congress passed Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1959, which amended the Rock Island Act in a number of significant respects.[5] Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a

[5] The relevant provisions of the Rock Island Act, both before and after amendment by the Staggers Rail Act, are set forth at J.S. App. 35a-42a.

fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 of the Rock Island Act (94 Stat. 1959). This section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act * * *" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The Staggers Rail Act also added language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act subsequently were held to be a taking. Section 110(e) of the Rock Island Act was amended to make explicit that it was a limitation of the liability of the United States only with respect to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act * * * shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA and the United States, supported by the Commission, moved the district court to vacate its injunction of

June 9, 1980.[6] The movants argued that passage of the Staggers Rail Act effectively mooted the June 9 injunction because the injunction applied to a statute no longer in existence and had no application to the re-enacted but nevertheless new and distinct obligations concerning labor protection that the Staggers Rail Act amendments imposed on the Commission and the other parties. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined pending appeal—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking of property—and therefore that the procedures established in the Rock Island Act, as amended by the Staggers Rail Act, should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (J.S. App. 3a-6a). The Court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 5a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 6a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 5a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering cred-

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[6] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980 (see J.S. App. 9a-11a), in the expectation that the President would sign the bill.

itors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court sua sponte entered an order (J.S. App. 7a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

RLEA, the United States and the Interstate Commerce Commission appealed the order granting the preliminary injunction to the Seventh Circuit sitting en banc, pursuant to Section 124(a) of the amended Rock Island Act (J.S. App. 41a-42a).[7] Relying on the Staggers Rail Act amendments, the court of appeals unanimously denied a motion filed by the private appellees to dismiss the appeal for lack of jurisdiction in light of the pending appeal to this Court in No. 80-415 (J.S. App. 2a). On the merits, the court affirmed without opinion by an equally divided vote (*ibid.*).[8] RLEA then took an appeal to this Court, docketed as No. 80-1239.

On April 27, 1981, this Court noted probable jurisdiction in No. 80-1239 and consolidated it with No. 80-415, while postponing consideration of the question of jurisdiction in the latter appeal until the hearing on the merits.[9]

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[7] While this appeal was pending in the Seventh Circuit, the private appellees filed a petition for a writ of certiorari before judgment. *Gibbons* v. *Railway Labor Executives' Ass'n*, No. 80-704 (filed Oct. 30, 1980).

[8] Chief Judge Fairchild and Judges Sprecher and Cudahy voted to reverse. Judges Swygert, Bauer and Wood voted to affirm. Judges Cummings and Pell did not participate.

[9] In our response to the jurisdictional statement in No. 80-415, the government urged that the June 9, 1980, injunction be vacated as moot in light of the passage of the Staggers Rail Act and the

SUMMARY OF ARGUMENT

A.

1. Although the district court titled its orders preliminary injunctions, the question whether the Rock Island Act effects a taking of property within the meaning of the Just Compensation Clause is properly before this Court. The injunctions below rested solely on a question of law; no trial on the merits was necessary to clarify the issues and none was contemplated. The court explicitly made a final determination that the labor protection provisions of the Rock Island Act are unconstitutional (see J.S. App. 6a, 10a-11a, 17a, 29a). Accordingly, its orders were effectively permanent injunctions and should be treated as such. Cf. *Sampson* v. *Murray*, 415 U.S. 61, 85-87 (1974).

A decision by this Court that considered only the issue whether the district court abused its discretion in issuing the preliminary injunctions and then remanded for a trial on the merits would not promote the efficient administration of justice. On remand, the district court would certainly enter a permanent injunction, beginning the appellate process anew and causing further delay—delay that would harm both the Rock Island employees and the orderly liquidation of the estate. Moreover, a remand would frustrate the express intent of both Congress and the district court to facilitate a rapid appellate resolution of the constitutionality of the Act (see J.S. App. 18a, 20a, 27a-28a). In these circumstances, it is well established that this Court is free to decide the underlying merits even if the case is technically at the preliminary injunction stage. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952).

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subsequent judicial proceedings. In our view, any issues presented in No. 80-415 that are not identical to issues presented in No. 80-1239 are moot. Accordingly, this brief will address only those issues presented in No. 80-1239.

2. Although the Tucker Act would provide the private appellees with an adequate remedy at law if the Rock Island Act were held to constitute a taking, this Court nevertheless should resolve the taking question in this case. In contrast to those cases where the Court has declined to decide the taking issue because it can be resolved in the Court of Claims, the taking issue here will never be more ripe for review. It presents a purely legal question that will not be illuminated by further developments, and it has been fully briefed by the parties.

Moreover, when a governmental regulation adjusting the burdens of economic life between private parties is held to be a taking, Congress should ordinarily be given the opportunity, to the extent possible, to choose between rescinding the regulation or paying just compensation. See *San Diego Gas & Electric Co.* v. *City of San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 22-23 (Brennan, J., dissenting). This consideration should be accorded particular weight here in light of the legislative background. In order to facilitate immediate implementation of the labor protection program, Congress clearly manifested its willingness to assume responsibility for payments made pending judicial review if they were ultimately held to be a taking. But Congress also provided for expedited appellate review so that questions of the constitutionality of the Act, specifically the taking question, would be resolved as quickly as possible. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22-23 (1980). Under these special circumstances, it is appropriate for the Court to decide the taking issue at this stage, thus giving Congress the option to rescind the regulation if it wishes to do so. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149-150 n.36 (1974).

B.

This Court has identified certain general principles that serve as guidelines in considering whether a valid exercise of the government's regulatory power rises to the level of a taking that requires just compensation. A

finding that a regulation constitutes a taking, which will be made only in unusual circumstances, depends on "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

The Rock Island Act is a valid exercise of the government's regulatory power. The labor protection provisions were passed in response to specific congressional findings that the provisions were necessary to preserve uninterrupted rail service on the Rock Island lines and to provide for an orderly transition of those lines. Section 102, 94 Stat. 399 (to be codified at 45 U.S.C. 1001). This Court has recognized that these are important public interest concerns, which the government is entitled to pursue by means of the imposition of labor protection. *United States* v. *Lowden*, 308 U.S. 225 (1939).

The nature of the government action does not indicate that the regulation should be held to be a taking. There is no physical invasion by the government nor any direct benefit to the government in its entreprenurial capacity. Rather, the Act simply adjusts "the benefits and burdens of economic life." *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124.

Nor does the economic impact of the regulation here indicate a taking. A critical factor in this facet of the taking inquiry is the extent to which the Rock Island Act interferes with distinct investment-backed expectations. The labor protection provisions of the Act do not interfere with any such expectations; they simply make more certain and quantify an obligation that the investors in the Rock Island reasonably should have foreseen when they entered the railroad business.

It has long been established that a railroad may be required to expend funds to further the public interest, even if the expenditures are not in the railroad's individual interest. A railroad may be required to operate an unprofitable line or even operate its entire system at a loss for a reasonable time while alternatives to abandonment are sought. In this regard, the Commission has had

a longstanding policy of conditioning rail line abandonments on the imposition of specific labor protection conditions. This Court has upheld this policy against a constitutional challenge as an exercise of the Commission's responsibility to protect the public interest in an adequate and efficient transportation system. *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373 (1942); *United States* v. *Lowden*, *supra*. And in 1976 and 1979 Congress enacted legislation adopting this administrative policy.

In the exercise of its discretion, the Commission has generally declined to attach labor protection conditions to whole line abandonments, but this does not mean that the private appellees had a reasonable investment-backed expectation that no labor protection obligation would be imposed on the abandonment of the Rock Island. First, on occasion the Commission has imposed employee protection conditions in cases of complete abandonments. Second, even prior to the passage of the Rock Island Act, the plain language of the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 915(a), appeared to require the imposition of labor protection here, although the reorganization court ultimately read the statute as leaving it discretion to decline to impose labor protection in whole line abandonments. Third, the Commission's prior policy with respect to small abandonments gave no assurance that it would not exercise its discretion to impose labor protection when a major carrier like the Rock Island was abandoning all its lines. Finally, the private appellees obviously had no expectation that the Rock Island would need to be liquidated when they invested in it; thus, even if they recently had reason to hope that no labor protection would be imposed in the event of a liquidation, they made no investments in reliance on that hope.

The fact that the Rock Island has been declared unreorganizable does not convert its labor protection obligation into a taking. In the context of a railroad reorganization, the railroad's labor protection obligation must be balanced against the benefit of a partial abandonment

of losing lines. By the same token, the Rock Island Act conferred certain benefits on the Rock Island, such as facilitating its liquidation and *limiting* its possible labor protection liability, that counterbalance to some extent the burden the statute imposed. Even apart from these benefits, however, the requirement that the estate pay a pre-existing obligation does not constitute a taking merely because the enterprise becomes insolvent.

Investors in the Rock Island have always been aware of their potential obligation to make labor protection payments in the event of an abandonment, if the public interest so demands. The public interest considerations that this Court has identified as justifying the imposition of labor protection—the need to compensate displaced employees and to maintain uninterrupted service over lines being purchased for continued rail use (see *United States* v. *Lowden*, *supra*, 308 U.S. at 240)—are equally present in connection with this liquidation as with a reorganization. Moreover, a rule that allowed labor protection for reorganizations, but not liquidations, would discourage employees from remaining in employment with a railroad that might be subject to liquidation, and it would tend to promote liquidations. Thus, conditioning a rail line abandonment on the provision of labor protection is no more a taking in connection with a liquidation than with a reorganization. In both cases, the obligation is assumed by investors when they enter the railroad business.

ARGUMENT

THE LABOR PROTECTION PROVISIONS OF THE ROCK ISLAND ACT DO NOT VIOLATE THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

A. The Question Whether The Rock Island Act Effects A Taking Of Property Is Properly Before This Court

1. Because the district court styled its orders in this case as preliminary injunctions, there is a threshold question whether the issue of the constitutionality of the

Rock Island Act is properly before this Court. As a general rule, a reviewing court's inquiry on appeal of a preliminary injunction is limited to whether the district court abused its discretion in issuing the injunction. See *University of Texas* v. *Camenisch*, No. 80-317 (Apr. 29, 1981), slip op. 4; *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). In the special circumstances of this case, however, it is appropriate for this Court to reach the merits of the controversy and rule on the constitutionality of the Rock Island Act.

Although the district court described its orders as preliminary injunctions, it is clear that the orders are in effect permanent injunctions, and they have been so treated by the parties to this litigation. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas* v. *Camenisch*, *supra*, slip op. 4. See generally 7 *Moore's Federal Practice* ¶ 65.04[1], at 65-66 (2d ed. 1980). This was not the purpose of the injunctions entered by the district court. Because the issue in this case involved purely a question of law, no trial on the merits was necessary to resolve it and, accordingly, no steps have ever been taken to hold a trial on the merits even though more than a year has elapsed since the entry of the first injunction.[10]

Rather, the purpose of the injunctions entered below was to preserve the relative positions of the parties pending a final, *appellate* resolution of the constitutionality of the Act. Thus, the district court did make an inquiry into the question of irreparable harm analogous to the inquiry that is ordinarily undertaken in the preliminary injunction context, but this inquiry was directed at the irreparable harm that would be suffered pending *appeal*. On this point, the court concluded that a failure to en-

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[10] To the extent that there was any uncertainty when the first injunction was issued whether a trial on the merits would be held, it was clear when the district court entered its second injunction on October 15, 1980, that no further proceedings in the district court with respect to the labor protection provisions of the complaint were contemplated.

join the operation of the Act would "halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors" (J.S. App. 5a; see also *id.* at 19a, 27a).[11] Indeed, the district court explicitly recognized "the absolute necessity in the present posture of this case for an appellate determination" of the constitutionality of the Act (*id.* at 28a), and it intended its order to facilitate that determination (see *id.* at 18a, 20a, 27a-28a).

Accordingly, the district court made a final determination that the labor protection provisions of the Rock Island Act were unconstitutional (see, *e.g.*, J.S. App. 6a, 10a-11a, 17a, 29a) and, indeed, it found that the specifics of the labor protection plan to be imposed by the Commission could not alter this conclusion (*id.* at 18a-19a). Moreover, the private appellees have always treated the district court's orders as decisions on the merits and have sought in this Court affirmance of those orders on the "basic issue * * * whether the labor protection scheme imposed by the Rock Island Act and reenacted by the Staggers Act is constitutional" (80-1239 Motion to Consolidate and Affirm 2; see also *id.* at 7, 11, 16). Thus, we submit that the orders that are the subject of these appeals should be treated as permanent injunctions, notwithstanding that the district court styled them as preliminary injunctions. Cf. *Sampson* v. *Murray*, 415 U.S. 61, 85-88 (1974).

Even assuming that the district court's orders are treated as preliminary injunctions, it is appropriate for the Court to reach the merits here. To remand this case for consideration of the question of a permanent injunc-

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[11] An inquiry into irreparable harm pending appeal, while technically not relevant to the question of issuing an injunction, was relevant to the question whether the injunction should be stayed pending appeal, which was also before the district court. The court denied appellant's request for such a stay (J.S. App. 21a), as did this Court twice. No. 80-1239, Feb. 23, 1981; 448 U.S. 909 (1980).

tion would serve no purpose other than further to postpone the conclusion of litigation that has already long delayed a program that Congress sought to implement expeditiously. The district court has already made clear its view that the Rock Island Act is unconstitutional, and there can be no doubt that it would enter a permanent injunction against its enforcement, which would begin the appellate process anew. In these circumstances, it would frustrate the interest of efficient judicial administration, as well as the express intent of the district court, for the Court to decline to reach the merits. Cf. *City of Newport* v. *Fact Concerts, Inc.*, No. 80-396 (June 26, 1981), slip op. 8.

It is well established that a reviewing court may reach the merits of a legal question when the district court's view of the law is the basis for a preliminary injunction. See, *e.g.*, *Delaware & Hudson Ry.* v. *United Transportation Union*, 450 F.2d 603, 619-620 (D.C. Cir.), cert. denied, 403 U.S. 911 (1971); *Ring* v. *Spina*, 148 F.2d 647, 650 (2d Cir. 1945); see generally C. Wright & A. Miller, *Federal Practice and Procedure* § 2962, at 636-637 (1973). And this Court in the past has found it appropriate to reach the merits, even of a constitutional question, despite the fact that the district court decided the question at the preliminary injunction stage. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952); see also *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975).

2. As appellant contends (J.S. 29), the Rock Island Act is constitutional even if it does effect a taking because the Tucker Act, 28 U.S.C. 1491, provides an adequate remedy at law. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 31 n.40. Accordingly, the district court erred in enjoining the Act as unconstitutional. It does not follow, however, that this Court should decline to decide whether the Rock Island Act effects a taking on the ground that that question can be adjudicated later in the Court of Claims.

In some cases, this Court has declined to decide a taking issue because of the existence of a remedy in the Court of Claims. Those cases, however, involved problems concerning the ripeness of the taking claim that are absent here. In *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 30, all parties agreed that the question whether the suspension of claims constituted a taking was not ripe for review. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978), there was substantial doubt whether the circumstances alleged to constitute a taking would ever occur. In *Hurley* v. *Kincaid*, 285 U.S. 95, 103-104 (1932), the Court noted that construction had not yet begun of the project that allegedly would result in a taking by flooding of the plaintiff's land. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court distinguished among the Fifth Amendment issues raised, ruling on the question whether stock could constitute just compensation (419 U.S. at 149-150 & n.36), but declining to reach the valuation questions because they depended on various contingencies and a more developed record (419 U.S. at 145-147). In all these cases, either it was uncertain whether the conduct alleged to be a taking would ever occur or the taking inquiry would have been aided by further developments, and the Court therefore had reasons not present here to postpone the taking inquiry. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 26-31.

This case stands in sharp contrast to the above line of cases. The taking issue presented here is purely a legal one—whether the imposition of any labor protection obligation on the Rock Island is a taking—and will not benefit from any further factual development. It has been fully briefed in the court of appeals and in this Court. A ruling by this Court that there is no taking would be dispositive of this appeal and would avoid future litigation. Thus, despite the existence of an adequate remedy at law, it is appropriate for the Court to

address the taking issue here as it has done in prior cases. See *Dames & Moore* v. *Regan*, *supra*, slip op. 15-16 n.6; *Andrus* v. *Allard*, 444 U.S. 51, 64-68 (1979).

Moreover, the particular circumstances of this case strongly suggest that the Court should address the taking question. When a governmental regulation adjusting the burdens and benefits of economic life between private parties is held to be a taking, the government ordinarily should be given an opportunity to make a choice whether to rescind the regulation or pay just compensation. See *San Diego Gas & Electric Co.* v. *City of San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 22-23 (Brennan, J., dissenting). The legislative background of this case indicates that this consideration should be given particular weight here. Congress recognized the possibility that the Rock Island Act would be challenged as an "unconstitutional taking," although it stated that it considered the challenge insubstantial. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22-23 (1980). Accordingly, it provided in Section 106(d) of the Rock Island Act for expedited appellate resolution of the taking question by requiring review of the Commission's labor protection plan by the Seventh Circuit within 60 days. *Ibid.* After enforcement of the Rock Island Act was enjoined and a stay pending appeal denied, Congress amended the statute for the specific purpose of alleviating "Justice Stevens['] expressed concern about the availability of [a Tucker Act] remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 137 (1980). Congress made explicit its retention of the Tucker Act remedy so that "the benefits and allowances will immediately become available to the qualifying Rock Island employees." *Id.* at 138. In so doing, Congress clearly assumed responsibility to make the appellees whole for interim losses sustained if the Act were later held to be a taking after the injunction was lifted. But Congress also preserved the expedited review procedures of Section 106(d) and

added a new Section 124 to ensure that the Seventh Circuit would rule on the constitutionality of the labor protection plan within 60 days.

Thus, although Congress exposed the United States to an undetermined potential liability for an interim taking, it also established special procedures that might enable it to limit the government's liability by rescinding the Act if the Act were found to effect a taking. In these unusual circumstances, it is clearly appropriate for this Court to decide the taking question and thereby afford Congress the opportunity to rescind the statute, if it chooses to do so. See *Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. at 149-150 n.36.

B. General Principles Under The "Takings" Clause

This Court has repeatedly recognized the impossibility of establishing a broad rule for determining whether a taking has occurred in a particular case; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). There are, however, some general principles that serve as a guide in making case-by-case determinations. The typical taking, of course, occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its power of eminent domain. See, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26 (1954). But in certain limited circumstances, a valid exercise of the government's regulatory power may rise to the level of a taking of private property for which just compensation is required under the Fifth Amendment. In determining whether such government actions constitute takings, this Court has identified two general factors of particular significance: "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

The first factor, the character of the government action, is assessed by looking at the nature of the interference with the property allegedly taken. Where an interference "can be characterized as a physical invasion by government" (see *United States* v. *Causby*, 328 U.S. 256 (1946)) or as an acquisition of assets by the government acting in its entreprenurial capacity (see *Armstrong* v. *United States*, 364 U.S. 40, 49-50 (1960)), it is more vulnerable to constitutional attack. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124, 128, 135. On the other hand, a taking ordinarily should not be found where the obligation "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This is because government regulation, by definition, involves the adjustment of rights for the public good, which necessarily results in some diminution in values incident to property. Government could not function if it were required to compensate property owners for each such regulatory burden; it would then be required to regulate by purchase. See *Andrus* v. *Allard*, *supra*, 444 U.S. at 65; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922).

The second factor, the economic impact of the restriction on the property, necessarily requires consideration of the bundle of rights and expectations that is property. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65-66; *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 130-131, 135-138. Thus, it is well established that even a substantial diminution in value or deprivation of the most beneficial use of property does not effect a taking. *Id.* at 131; see, *e.g.*, *Hadacheck* v. *Los Angeles*, 239 U.S. 394, 408 (1915). And perhaps the most critical factor in assessing the economic impact of a regulation is the degree to which

it interferes with distinct investment-backed expectations. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. See also *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

These criteria cannot establish a "set formula" for adjudicating challenges under the Takings Clause; rather, they provide guidelines for identifying those unusual cases where "justice and fairness" require the government to pay compensation for private economic injuries suffered as a result of regulation in the public interest. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. Ultimately, the resolution of each case requires an individual "weighing of private and public interests" (*Agins* v. *City of Tiburon*, 447 U.S. 255, 261 (1980)) to determine whether "the public at large, rather than a single owner, must bear the burden of an exercise of [government] power in the public interest" (*id.* at 260)—a determination that calls "as much for the exercise of judgment as for the application of logic." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65.

C. The Labor Protection Provisions Of The Rock Island Act Do Not Effect A Taking

1. *The Labor Protection Provisions are a Legitimate Exercise of Congress' Regulatory Power that Promotes the Public Interest in Continued Rail Service*

There can be little doubt that enactment of the labor protection provisions of the Rock Island Act is a legitimate exercise of congressional power. The collapse of the Rock Island created a serious crisis in rail service in the Midwest, and Congress enacted the Rock Island Act to deal with the resulting problems. In particular, Congress declared that legislation to establish and provide funding for a labor protection plan was "essential to provide for an orderly transition" of the Rock Island. H.R. Conf. Rep. No. 96-1041, 96th Cong., 2d Sess. 26

(1980). Congress concluded that, without such a plan, service over the Rock Island lines would be disrupted, which would have serious adverse affects on the economy of the Midwest and on the ongoing efforts to sell the lines.[12] Efforts to avoid the detrimental impact of these consequences on interstate commerce unquestionably are within Congress' power under the Commerce Clause.

Moreover, this Court has noted that communities become dependent on railroad service to the extent that it becomes "an integral part of the communal life." *The Minnesota Rate Cases*, 230 U.S. 352, 452 (1913). The existence of railroad service attracts people and investment to a community on the expectation that it will continue. Clearly, Congress has broad authority to protect this public interest by taking steps to preserve uninterrupted rail service. See *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1371 (Spec. Ct. 1977).

Thus, the labor protection provisions of the Rock Island are a proper exercise of Congress' legislative power to

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[12] Section 102 of the Rock Island Act, 94 Stat. 399 (to be codified at 45 U.S.C. 1001), provides in full:

> Congress hereby finds that—
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> (1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;
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> (2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;
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> (3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and
>
> (4) premature cessation of services over lines which are the subject of pending purchase application [*sic*] would result in harm to the shipping public and could imperil continuation of vital commuter service.

protect interstate commerce and the public welfare (see, *e.g.*, *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 478-479 (1924)), and the only question here is whether the impact of the regulation is such that the Constitution requires the government to pay compensation. See generally *United States* v. *Lowden*, 308 U.S. 225 (1939).

2. *The Character and Economic Impact of the Government Action Here Does Not Indicate a Taking Because it Does Not Interfere with Any Reasonable Investment-Backed Expectations*

Those aspects of a particular government regulation that have often been cited as indicative of a taking are absent here. This Court has stated that a taking is more likely to be found when a regulation directly benefits the government in its entreprenurial capacity. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, No. 79-1033 (Dec. 9, 1980), slip op. 9; *Armstrong* v. *United States*, *supra*, 364 U.S. at 48-49; *United States* v. *Causby*, *supra*, 328 U.S. at 262-263 n.7. See also Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 62-63 (1964). Here, the United States itself derives no direct benefit from the regulation; the payments provided for in the statute are to be made to railroad employees displaced by the collapse of the Rock Island, in order to ensure continued rail service.

A taking is also indicated when there is an actual physical invasion of property by the government. Compare *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), and *United States* v. *Causby*, *supra*, with *Batten* v. *United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963) (compensability of diminution in property value depends on whether aircraft causing harm fly over or only alongside affected property). Clearly, there has been no such physical invasion here since this is not a case that involves real property.

Rather, the government action simply requires the payment by the estate of certain employee benefits. Of course, as the private appellees have argued, payment of these benefits diminishes the value of the estate and hence may reduce the sums eventually recovered by the creditors. But such a diminution in value characterizes almost every regulation; it is no indication that the regulation should be characterized as a taking. See *Pennsylvania Coal Co.* v. *Mahon*, *supra*, 260 U.S. at 413. Thus, in *Dayton-Goose Creek Ry.* v. *United States*, *supra*, 263 U.S. at 484, this Court rejected the claim that the requirement that certain profitable railroads transfer a portion of their profits to the Commission and to less profitable railroads constituted a taking. And in *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, where the Court upheld the constitutionality of the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, which directed coal mine operators to make payments to former employees who suffer from black lung disease, it was not even contended that the employee payments constituted a taking.

In assessing the economic impact of a regulation for the purpose of determining whether it constitutes a taking, the extent to which it interferes with investment-backed expectations is of particular significance. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124. Examination of this factor here compels the conclusion that the Rock Island Act does not effect a taking. The employee protection payments required by the Act do not violate any distinct expectation of investors; on the contrary, the Act simply makes more certain and establishes a limitation on, and a procedure for satisfying, a recognized obligation of railroads—employee protection. This is the sort of obligation that investors in the Rock Island should reasonably have anticipated when they invested in the railroad.

The railroad industry is a classic example of a heavily regulated business in which investors accept as a condition of their participation the fact that their private

profit-making interests may sometimes be subordinated to the public interest. See, *e.g.*, *Munn* v. *Illinois*, 94 U.S. 113, 130 (1876); *Chicago, Burlington & Quincy R.R.* v. *Iowa*, 94 U.S. 155, 161 (1876). Specifically, it has long been recognized that a railroad may be required to make various expenditures of funds in the public interest, even if they clearly are not in the railroad's individual interest. In *Atlantic Coast Line R.R.* v. *North Carolina Corporation Commission*, 206 U.S. 1 (1907), for example, this Court ruled that a railroad could be required to run an additional train at a loss in order to aid the public in making connections with another carrier. See also *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953) (railroad may be forced to pay for improvements from which it derives little or no benefit); *Baltimore & Ohio R.R.* v. *United States*, 345 U.S. 146 (1953) (ICC may impose rates that do not cover expenses on certain items). And in *Dayton-Goose Creek Ry.* v. *United States*, *supra*, this Court held that a railroad may be required to remit to the Commission profits that the Commission deems to be in excess of a reasonable rate of return—even if the profits derive from fair and equitable rates.[13]

When a railroad enters reorganization proceedings because its operation as a whole has become unprofitable, its obligation to the public does not end. As the private appellees have acknowledged (see 80-415 Motion to Affirm 11), "[r]ailroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system." See *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 671 (1935). The Fifth Amendment, of course,

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[13] See also *ICC* v. *United States ex rel. Los Angeles*, 280 U.S. 52, 64-65 (1929); *Colorado* v. *United States*, 271 U.S. 153, 161-162 (1926); *Erie R.R.* v. *Board of Public Utility Commissioners*, 254 U.S. 394, 409 (1921).

does not permit a railroad to be forced to continue operations at a loss indefinitely when there is no hope of a restoration of the railroad as a profit-making concern. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920). But consistent with the Fifth Amendment, a railroad may be ordered to continue operations at a loss while the Commission considers alternatives in the public interest to abandonment, even though this continued operation will erode the creditors' security. *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 122-123; *New Haven Inclusion Cases*, 399 U.S. 392, 490-492 (1970); *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 611 F.2d 662, 667 (7th Cir. 1979); *In re Valuation Proceedings Under §§ 303(c) & 306 of the Regional Rail Reorganization Act, supra*, 439 F. Supp. at 1371.

Providing certain protections to employees displaced by a railroad's abandonment of service is another example of an expenditure railroads are required to make even though it does not redound to their private benefit. The Commission has had a longstanding policy of imposing labor protection as a condition of its approval of abandonment applications.[14] And Congress itself in 1976 and 1979 enacted legislation requiring the imposition of specific labor protection conditions in rail line abandonments. Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), 49 U.S.C. (Supp. III) 10903 (b)(2) and 11347; Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(c).

In *United States* v. *Lowden, supra*, this Court rejected a challenge to the Commission's policy of imposing labor protection conditions. In the context of a railroad consolidation and lease, the Court held that mitigation of harm to displaced employees is in the public interest

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[14] Congress originally granted the Commission the authority to impose conditions on abandonments in the Transportation Act of 1920, ch. 91, 41 Stat. 477-478. See 49 U.S.C. (1970 ed.) 1(18), 1(20).

because it protects the orderly and efficient operation of the national railroad system by maintaining good labor relations and employee morale.[15] Rejecting the contention that the imposition of labor protection violated the Fifth Amendment, the Court concluded (308 U.S. at 240):

> Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the costs of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege. * * * Moreover we cannot say that this limited and special application of the principle, fully recognized in our cases sustaining workmen's compensation acts, that

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[15] The Court explained (308 U.S. at 233-236; footnote omitted):

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute.
>
> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.
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> * * * * *
>
> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

> a business may be required to carry the burden of employee wastage incident to its operation infringes due process.

Subsequently, this Court confirmed that "[e]xactly the same considerations of national importance are applicable" in connection with a railroad abandonment as with a consolidation and that the Commission is also authorized to impose labor protection conditions in abandonments. *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 378 (1942).

Despite this recognition by all three branches of government that labor protection conditions will ordinarily be imposed on rail line abandonments, the private appellees protest (80-415 Motion to Affirm 16) that the Rock Island Act imposes a "wholly new" and unexpected labor protection obligation on the Rock Island. The basis for this contention is the fact that the Commission has traditionally treated partial and whole line abandonments differently with respect to labor protection. But, to the extent the Commission has drawn such a distinction, it has been solely as an exercise of its administrative discretion. In *ICC* v. *Railway Labor Executives Ass'n*, *supra*, this Court held that the Commission has broad discretion to attach labor protection conditions to abandonments, and it did not imply any restriction on the Commission's power with respect to whole line abandonments. In exercising this mandate, the Commission ordinarily has imposed specific labor protection conditions on partial abandonments;[16] with respect to whole line abandonments, the Commission has determined that the question whether employee protective conditions are warranted depends on the facts of each case. See, *e.g.*, *Tennessee Central Ry. Abandonment*, 333 I.C.C. 443, 454

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[16] For many years, the Commission customarily imposed the "Burlington conditions," which required that employees be protected from the adverse effects of the abandonment for the lesser of four years or the duration of their employment. See *Chicago, Burlington & Quincy R.R. Abandonment*, 257 I.C.C. 700 (1944).

(1968); *East Carolina Ry. Abandonment*, 324 I.C.C. 506, 521 (1964). Although, as a general rule, the Commission has declined to attach labor protection conditions to whole line abandonments (see, *e.g.*, *Wellsville, Addison & Galeton R.R. Abandonment*, 354 I.C.C. 744 (1978)), it has ruled in some cases that such conditions should be imposed.[17]

The existence of this general Commission practice is hardly a basis for asserting that Congress' decision to impose labor protection conditions on the abandonment of the Rock Island interfered with the distinct expectations of the Rock Island investors to the degree that it should be held to be a taking. First, as noted above, on occasion the Commission has included the imposition of labor protection conditions even in cases of complete abandonments. The Commission's prior policy thus gave no assurance that it would not consider labor protection necessary in the special circumstances of the Rock Island abandonment. Those cases in which the Commission has permitted whole line abandonments without labor protection involved smaller carriers and significantly fewer employees than the Rock Island.[18] Thus, the effect of such abandonments on the national transportation policy was comparatively minor; a small number of displaced employees could be expected to be reabsorbed into the

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[17] See *Washington & Old Dominion R.R. Abandonment of Entire Line in Virginia*, 331 I.C.C. 587, 601-603 (1968); *East Carolina Ry. Abandonment*, *supra*, 324 I.C.C. at 520-521; *Seaboard Air Line R.R. Trackage Rights, Atlantic Coast R.R.*, 312 I.C.C. 797, 799-801 (1962).

[18] For example, in *Okmulgee Northern Ry. Abandonment*, 320 I.C.C. 637 (1964), on which the private appellees rely (80-415 Motion to Affirm 15), only five employees were subject to loss of employment. 320 I.C.C. at 645. The Commission qualified its order by stating that the imposition of labor protection provisions in total line abandonments "would not serve, *in most instances*, to strengthen the transportation system * * *" (*ibid.*; emphasis added).

work force and the abandonment of a small carrier would not cause repercussions throughout the industry. Here, by contrast, the failure to provide labor protection in connection with the Rock Island could be expected to have a serious effect on the morale of other employees in the industry who would fear for their own financial security. See *United States* v. *Lowden*, *supra*, 308 U.S. at 236.[19]

Moreover, it cannot be maintained that the passage of the Rock Island Act was a sudden and unexpected imposition of labor protection on a whole line abandonment. On the contrary, it is arguable that the Rock Island was subject to a labor obligation on the abandonment of its lines well before the Rock Island Act was passed. Since 1976, the 4R Act, 49 U.S.C. (Supp. III) 10903(b)(2) and 11347, and later the Milwaukee Railroad Restructuring Act, 45 U.S.C. (Supp. III) 904(a) and 915(a), appeared on their face to make mandatory the imposition of labor protection conditions on whole line abandonments. The Commission itself has noted that "the precise language of Section 1a(4) of the [Interstate Commerce] Act would appear to require imposition of employee protection conditions in all permitted abandonments." *Wellsville, Addison & Galeton R.R. Abandonment*, *supra*, 354 I.C.C. at 745.[20] Based on the legislative history (see S.

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[19] Contrary to appellees' suggestion (80-415 Motion to Affirm 15-16), the Commission did not recommend in its May 23, 1980, report to the reorganization court that its precedents declining to impose labor protection in whole line abandonments should be applied here. Rather, the Commission pointedly refused to make any recommendation and specifically noted that "the entire issue of imposing labor protective conditions may be rendered moot shortly by Congressional action" (80-415 Motion to Affirm App. I-17), which in fact it was by the enactment of the Rock Island Act six days later.

[20] Section 1a(4) of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10903(b)(2), provides in pertinent part:

> Each certificate [of abandonment] shall also contain provisions to protect the interests of employees. The provisions shall be

Conf. Rep. No. 94-595, 94th Cong., 2d Sess. 218 (1976)), the Commission has taken the position that the 4R Act legislation did not remove its discretion to decline to order labor protection payments, and the reorganization court ultimately adopted an analogous interpretation in this case with respect to the Milwaukee Act (J.A. 270a-271a), but the private appellees had no assurance that the statute would be interpreted in this fashion and there is certainly some question whether the reorganization court's interpretation is correct. See H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 21-23 (1980).[21]

Thus, the "expectation" of the private appellees that allegedly has been frustrated by the Rock Island Act is nothing more than the hope that labor protection conditions would not be imposed upon the abandonment of its lines. Although this hope was perhaps a plausible one, appellees had no reasonable certainty that it would come to fruition and no basis for taking any actions in reliance on it such that Congress' contrary decision that the public interest does require labor protection in the circumstances of this case should be considered a taking. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972);

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at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

Section 17(a) of the Milwaukee Act, 45 U.S.C. (Supp. III) 915(a), provides in pertinent part:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49.

[21] Section 17(a) of the Milwaukee Act transfers from the Commission to the reorganization court the power to authorize abandonments, with its attendant requirement that labor protection be imposed, in cases pending under Section 77 of the old Bankruptcy Act, such as the Rock Island reorganization. See 45 U.S.C. (Supp. III) 915(a). In these cases, the Commission acts in an advisory capacity. See 11 U.S.C. (Supp. III) 1170.

Dames & Moore v. *Regan*, *supra*, slip op. 15-16 n.6. Moreover, whatever the reasonableness of the appellees' hope that they would be relieved of any employee protection obligation, that hope is not the type of *investment-backed* expectation to which this Court has referred. When the appellees invested in the Rock Island, they certainly had no expectation that it would be forced to abandon all of its rail operations. Rather, they would have considered much more likely the possibility that at some point in the future *some* rail lines might have to be abandoned, which necessarily would entail the payment of employee protection expenses. Thus, it cannot be said that the appellees invested in the Rock Island on the assumption that they would not be required to make labor protection payments.

The private appellees' taking claim contrasts sharply with those cases where this Court has found an interference with investment-backed expectations that rises to constitutional dimensions. In *Kaiser Aetna* v. *United States*, *supra*, for example, a private company "invested substantial amounts of money in making improvements" to convert a shallow lagoon into a marina. 444 U.S. at 176. The purpose of these improvements, including establishing access from the marina to the ocean, was to enable the company to provide a service for which it would charge a fee. Under these circumstances, this Court held that it would be a taking for the government to require free public access to the marina once it was connected to the ocean; the government's unconditional consent to the dredging of a channel to the ocean created an "expectancy" that the dredging would not cause the marina to lose its character as private property, on which the company relied in making its substantial investment. 444 U.S. at 179. And in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), relied on by appellees (80-415 Motion to Affirm 19) although it is not a taking case, the Court struck down as violative of the Contract Clause a Minnesota law that altered established vesting

schedules in a pension plan. The Court found that the statute imposed a "completely unexpected liability" on a company that had "relied heavily, and reasonably, on [a] legitimate contractual expectation" that its employees' pension rights would vest in accordance with the terms of the pension plan. 438 U.S. at 246-247.

Here, by contrast, appellees do not allege that they made any investment in reliance on an expectation that has been defeated by the Rock Island Act. They are seeking to avoid an obligation that they always knew might be imposed upon them, simply on the basis that they had reasonably hoped that the obligation would be avoided. This Court has consistently rejected this type of contention: " '[T]hey invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs.' " *New Haven Inclusion Cases*, *supra*, 399 U.S. at 491-492, quoting *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R.R.*, 328 U.S. 495, 535-536 (1946).

3. *The Determination that The Rock Island is Unreorganizable Does Not Convert Its Labor Protection Obligation Into a Taking*

ICC v. *Railway Labor Executives Ass'n*, *supra*, and *United States* v. *Lowden*, *supra*, establish beyond dispute that labor protection conditions attached to a rail line abandonment do not effect a taking. The district court's contrary conclusion rests solely on the proposition that the principles underlying those cases are inapplicable once a railroad has been declared to be unreorganizable. In response to this contention, it should be noted at the outset that the fact that the Rock Island will not resume rail operations does not mean that the estate has not received any benefits from the Rock Island Act that counterbalance its labor protection obligation to some

extent. Cf. *United States* v. *Lowden*, *supra*, 308 U.S. at 240.

The Rock Island Act was enacted before the district court's abandonment order was entered. At that time, under the plain language of the Milwaukee Act, 45 U.S.C. (Supp. III) 915, the Rock Island was still subject to the potential imposition of labor protection specified in 49 U.S.C. (Supp. III) 11347, which requires at least protection against adverse effects on an employee for the lesser of six years or the period of the individual's employment. See *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The Rock Island Act *limited* this potential obligation and provided a means for funding it, thus helping pave the way for the beginning of the liquidation process by minimizing the delay that would be likely further to erode the value of the estate. Indeed, one of the express purposes of the Act was to avoid disturbing pending purchase applications for Rock Island lines. See Section 102 of the Rock Island Act, 94 Stat. 399 (to be codified at 45 U.S.C. 1001). In its subsequent consideration of the Staggers Rail Act, Congress identified several ways in which it had assisted the Rock Island in preserving the value of its estate, such as by making funds available and expediting agency consideration. H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980).[22] The fact that the private appellees do not deem these benefits of the Act to outweigh the burden of the labor protection provisions does not convert

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[22] The Conference Report noted:

> [T]he conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally-supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138 (1980). See also H.R. Rep. No. 96-839, 96th Cong., 2d Sess. 22 (1980).

the Act into a taking. See *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 135.

In any event, apart from any benefit to the estate from the Rock Island Act, it is clear that the requirement that the estate pay a pre-existing obligation cannot constitute a taking. *Brooks-Scanlon Co.* v. *Railroad Commission*, *supra*, establishes that a railroad need not continue to operate at a loss indefinitely once it is determined that the railroad cannot be reorganized on a profit-making basis.[23] But to say that an unreorganizable railroad may be relieved of the burden of running a losing operation does not mean that it must be relieved of its specific preexisting obligations. It is manifest that if an obligation imposed on an enterprise is properly viewed as a regulation (for example, an obligation to pay for the cleanup of oil spills), it is not converted into a "taking" merely because the enterprise becomes insolvent. Similarly, the Rock Island should not be relieved of its obligation to provide financial assistance to its displaced employees simply because it is going to be liquidated.[24] This obligation merely reflects the service

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[23] This principle is qualified by the rule that an unreorganizable railroad may be required to operate at a loss for some period pending an examination of alternatives to total abandonment. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, *supra*, 611 F.2d at 667. See page 27, *supra*. The Rock Island has not suffered any of these losses. Prior to the reorganization court's finding in January 1980 that the Rock Island could not be reorganized, the Rock Island had ceased providing service over its lines. The lines were being operated by a directed service carrier, pursuant to 49 U.S.C. (Supp. III) 11125, at the expense of the United States (see J.A. 379a n.3).

[24] Obligations to employees traditionally have been given a high priority in the dissolution of bankrupt railroad estates. Under Section 77(n) of the old Bankruptcy Act, 11 U.S.C. 205(n), personal injury claims of employees were to be treated as operating expenses of the railroad. This provision was unsuccessfully challenged in the courts as effecting a taking without just compensation. See *Thompson* v. *Siratt*, 95 F.2d 214 (8th Cir. 1938); *In re Chicago, Rock Island & Pacific Ry.*, 90 F.2d 312 (7th Cir.), cert. denied, 302 U.S. 717 (1937). See also 11 U.S.C. 104 (wage claims given high priority in bankruptcy proceedings).

these employees gave the railroad when it was an ongoing operation.

The public interest requirements that give rise to a potential labor protection obligation when an investor enters the railroad business do not evaporate when a railroad the size of the Rock Island commences liquidation. The need "to compensate the loss to employees" (*United States* v. *Lowden*, *supra*, 308 U.S. at 240) because of their displacement is equally present when employees are displaced because of a liquidation, rather than a reorganization. Although the Rock Island is not destined to resume rail service, several of its lines are being purchased for continued rail use; thus, maintaining "service uninterrupted by labor disputes" and preventing "loss of employee morale" remain important objectives. See *id.* at 236.[25] Moreover, a rule that provided for employee protection in reorganizations but not in major liquidations would be particularly inimical to the public interest. Work force stability would be endangered because employees would be reluctant to continue working for a carrier in financial difficulties for fear that it would commence liquidation, leaving the employees with no protection against displacement. And, as Congress noted, the failure to impose labor protection requirements in major rail bankruptcies would "promote liquidations, to the detriment of the employees and the public interest." H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 138-139 (1980). In short, the obligation to pay labor protection when the public interest requires is an

[25] This Court has recognized that a railroad remains responsible to the public interest even if it has been declared unreorganizable. In the *New Haven Inclusion Cases*, *supra*, 399 U.S. at 461, the Court observed that "no one here quarrels with the proposition that in the event of a liquidation, New Haven would have been obliged to obtain a certificate from the Commission pursuant to § 1(18) of the Interstate Commerce Act." That section empowers the Commission to attach to the certificate of abandonment conditions necessary for the public convenience, including labor protection.

obligation assumed by railroad investors when they enter the railroad business, and requiring them to honor that obligation in the course of a liquidation does not constitute a taking.

CONCLUSION

The judgment of the court of appeals in No. 80-1239 should be reversed. The order of the district court in No. 80-415 should be vacated as moot.

Respectfully submitted.

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